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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TOM BATES, *et al.*,
Petitioners,

v.

BILL JONES,
SECRETARY OF STATE OF CALIFORNIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICI CURIAE REPRESENTATIVE BILL MARKHAM, DARRELL E. BROWN, AND CENTER TO PROTECT FREE SPEECH, INC., IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Oregon Representative Bill Markham, Mr. Darrell E. Brown, and the Center to Protect Free Speech, Inc., hereby respectfully move for leave to file the attached brief *amicus curiae* in this case. The consents of the attorneys for the petitioners, the attorneys for respondent Conny McCormack, the attorneys for respondent Bradley J. Clark, and the attorneys for intervenors-appellants below Peter F. Schabarum and Lewis K. Uhler have been obtained. Copies of their letters consenting to the filing of this brief have been filed with the clerk of the court. The

consent of the attorneys for respondent Bill Jones, the California Secretary of State, was requested but refused.

The interest of Representative Markham, Mr. Brown and the Center to Protect Free Speech, Inc., in this case arises from the fact that they are plaintiffs in a case in the United States District Court for the District of Oregon challenging the constitutionality of Oregon's lifetime term limits. *Markham v. Keisling*, No. 97-6237TC (D.C. Or.). Like the California term limits at issue in *Bates v. Jones*, the Oregon limits bar a person from serving more than six years (three terms) in the Oregon House of Representatives and from serving more than eight years (two terms) in the Oregon Senate. On December 16, 1997, the Federal District Court of Oregon entered its order and declared the lifetime term limits unconstitutional. On December 19, 1997, the Ninth Circuit Court of Appeals sitting *en banc*, upheld the lifetime limits at issue in *Bates*; consequently, on December 29, 1997, the Federal District Court of Oregon vacated its order of December 16, 1997, and stayed the action pending resolution of the *Bates v. Jones* case by this Court.

A holding by this Court that the lifetime term limit in California imposes a severe infringement upon the First and Fourteenth Amendment rights of voters would be dispositive of the Oregon case. The following brief *amicus curiae* emphasizes why and in what additional ways the voters of numerous states will be affected by the Court's treatment of the *Bates* case and why it is necessary for the Supreme Court to adopt a rule to guide the constitutional treatment of an issue which will soon confront many states.

By refusing its consent, the Secretary of State of California has made clear that California does not wish voters from other affected states to urge upon this Court the importance of the instant case. But this case presents questions whose resolution will be of immediate importance beyond the particular facts and parties involved. It is

precisely for that reason that the plaintiffs in *Markham v. Keisling* respectfully request consideration of their arguments why certiorari should be granted.

Respectfully submitted,

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February 13, 1998

QUESTION PRESENTED

Whether a lifetime ban in a state constitutional provision limiting the number of terms an individual may serve in legislative office constitutes a severe burden upon the First and Fourteenth Amendment rights of voters and if so, whether such a lifetime ban is narrowly tailored to advance a compelling state interest.

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BRIEF OF AMICI CURIAE REPRESENTATIVE BILL MARKHAM, DARRELL E. BROWN, AND CENTER TO PROTECT FREE SPEECH, INC., IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE [1]

Representative Bill Markham and Darrell E. Brown are Oregon residents. The Center to Protect Free Speech, Inc., ("the Center") is an Oregon nonprofit corporation. Rep. Markham is a member of the Oregon House of Representatives from the 46th legislative district and has

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[1] No counsel for any party to this action has authored this brief in whole or in part. No person, other than amicus curiae Center to Protect Free Speech and its contributors have made monetary contributions to the preparation or submission of this brief. No party to this action has made such a contribution. Rule 37.6.

served that district from 1968 to 1974 and from 1976 to the present. Rep. Markham is prohibited by Oregon's lifetime legislative term limits from ever serving again in the Oregon House of Representatives. Mr. Brown is a voter in Oregon's 46th legislative district. He has voted for and supported Rep. Markham in past elections for the Oregon House of Representatives and, if given the opportunity, would do the same in future elections. The Center also desires to have Rep. Markham continue to serve in the Oregon House of Representatives and would provide support, financially and otherwise, to Rep. Markham if he were allowed to run again for the Oregon House of Representatives.

Messrs. Markham and Brown, along with the Center, ("Amici") brought an action in the United States District Court for the District of Oregon ("Oregon District Court"), challenging the constitutionality of Oregon's lifetime term limits. Like the California lifetime term limits at issue in *Bates v. Jones,* the Oregon limits bar a person from serving more than six (6) years (three terms) in the Oregon House of Representatives and from serving more than eight (8) years (two terms) in the Oregon Senate.[2] On December 16, 1997, the Oregon District Court entered its order and declared the lifetime term limits unconstitutional. *Markham v. Keisling,* No. 96-6237-TC (D.C. Or., filed Dec. 16, 1997) ("Order"). Adopting in large part the reasoning of the trial court in *Bates v. Jones,* the Oregon District Court held that the lifetime term limits constitute a severe burden on plaintiffs' voting and associational rights.[3] Applying strict scrutiny, the Oregon District

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[2] The Oregon lifetime term limits are, in fact, slightly more severe than the California limits at issue in *Bates* since Oregon also limits to twelve (12) the aggregate number of years that a person can serve in both chambers of the state legislature.

[3] The Oregon District Court stated "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is

Court held that lifetime term limits are not narrowly tailored to address any compelling state interest,[4] as any legitimate interest of the state could be addressed by less onerous means, including consecutive term limits.[5] On December 19, 1997, the Ninth Circuit Court of Appeals, sitting *en banc*, upheld the lifetime term limits at issue in *Bates*; consequently, on December 29, 1997, the Oregon District Court vacated its order of December 16, 1997. The Oregon District Court has stayed the action pending resolution of the *Bates v. Jones* case by this Court.

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undermined. [Citations omitted.] As noted above, the burden on this right is severe—the ability of voters to vote for a term limited candidate is *forever* barred. . . . Measure 3 goes beyond the pale of narrowness by *forever* barring certain segments of society from voting for their candidate of choice and permanently silencing that segment's voice in the state legislature." Order, pp. 9-10 (emphasis in original).

[4] With regard to the State's interest in "promotion of varied representation" the Oregon District Court said "[t]he idea that a state may restrict the speech elements of 'professional legislators' and their supporters in order to enhance the voice of 'citizen legislators' and their supporters is foreign to the First Amendment." Order, p. 7. With respect to the interest of "broadening opportunities for public service" the Oregon District Court held that this interest suffered from the same infirmity as the previous one. "[C]ompetition is not enhanced by eliminating, as the State asserts, the competitor most likely to win. Competition is enhanced by allowing all to compete, including incumbents, because it promotes electoral accountability." Order, p. 8.

[5] Unlike lifetime terms limits, consecutive term limits merely require that a person sit out some period of time (usually one term) before being again able to run for office.

ARGUMENT

THE NINTH CIRCUIT COURT OF APPEALS' DECISION INCORRECTLY DECIDES AND LARGELY IGNORES A LEGAL QUESTION OF GREAT IMPORTANCE THAT MERITS THE CONSIDERATION OF THIS COURT

The Ninth Circuit Court of Appeals upheld the California lifetime term limits on the ground that such limits constitute a "neutral candidacy qualification, such as age or residence, which the State certainly has a right to impose." *Bates v. Jones*, 131 F.3d 843, 847 (9th Cir. 1997). This conclusion of the Ninth Circuit is backed only by its determination, unsupported by this Court's decisions and contradictory to the express finding of the trial court, that the impact of the term limits on the rights of voters and candidates is "not severe." *Id.* Accordingly, the Ninth Circuit held that precluding all voters from voting for an entire class of candidates (i.e. those with legislative experience) is a "choice [for the majority of the state's voters] to make." *Id.* As the petition observes (Pet. 7), the entire analysis by the Ninth Circuit's majority spans approximately one single page of the Federal Reporter. The dismissive treatment of this issue is quite troubling in light of this Court's long line of ballot access cases and the Court's recent treatment of federal term limits in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

The burden imposed by California's and Oregon's lifetime term limits exceeds in severity every ballot access restriction that this Court has struck down over the last few decades. The restriction at issue in this case is demonstrably more burdensome than the signature requirements struck down in *Norman v. Reed*, 502 U.S. 279 (1992), and *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173 (1979), the filing deadline invalidated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and the filing fees struck down in *Lubin v. Panish*, 415 U.S. 709

(1974). All of these cases involved a procedural impediment to ballot access; candidates, with sufficient industriousness or assiduity, could overcome the restrictions struck down in *Norman*, *Socialist Workers*, *Anderson*, and *Lubin*.

The burden imposed by lifetime term limits is, by contrast, absolute and unavoidable. There is nothing that an experienced legislator can do to qualify to run for another term in office. The Ninth Circuit compares lifetime term limits to age and residency requirements, but even these restrictions are not based upon immutable characteristics. A person under the prescribed age or living outside a legislative district can satisfy these requirements by achieving the requisite age with the passage of time or moving to the appropriate district. A person who has served two terms in the state senate or three terms in the state house, however, is permanently barred from ever running again for that office. More importantly for constitutional purposes, voters are forever barred from voting for or supporting the candidates disqualified by virtue of their experience. The voters who are adversely inpacted therefore belong to a distinct and identifiable class: those preferring candidates who possess experience in office.

It is perhaps even more alarming that term limits, by design, prohibit voters from voting for the very candidates that are, by definition, preferred by the voters.[6] It is difficult to imagine a more severe impingement on voting rights than to prevent voters from voting for their preferred candidates. The residency and age qualifications pose no similar burden, as voters do not appear to have

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[6] The candidate who has held a legislative office for the requisite period of time has, of course, been the candidate of choice for the majority of a legislative district's voters. Those incumbents who have effectively served their districts throughout their terms in office would presumably stand a good chance of being the majority's choice for re-election.

the same preference for non-residents and minors as they do for incumbents.[7]

Additionally, the Ninth Circuit's opinion cannot be reconciled with this Court's characterization of state-imposed term limits on federal candidates in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). This Court in *Thornton* distinguished term limits from past ballot access cases:

> The provisions at issue in *Storer* [*v. Brown*, 415 U.S. 724 (1974)] and our other Elections Clause cases were thus constitutional because they regulated election *procedures* and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position.

514 U.S. at 835 (emphasis in original). The Court also distinguished term limits as "measures that exclude candidates from the ballot without reference to the candidate's support in the electoral process." *Id.* The Ninth Circuit's opinion completely disregards these statements by this Court and simply concludes that the lifetime term limits are a "neutral candidacy qualification" which the state "certainly has a right to impose." *Bates v. Jones*, 131 F.3d at 847.

The Ninth Circuit's description of term limits as "neutral" contradicts the express statements of this Court in *Thornton*. Far from being neutral, term limits target experienced candidates and the voters that prefer such experience. Term limits, therefore, discriminate against an identifiable group of voters who share the viewpoint that legislative experience is a desirable attribute.

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[7] The Ninth Circuit opinion suggests that states may impose any age or residency qualification since such qualifications are "neutral." The court's opinion would seemingly allow states to, for example, require candidates to be older than fifty (50) years of age and/or to have resided in the legislative district for a period of at least thirty (30) years.

While *amici* believe the Ninth Circuit's ruling to be untenable under the guiding decisions of this Court, they are more concerned with the court's perfunctory analysis of this issue and with the broad license the opinion gives to states to implement other severe burdens on voting rights. Indeed, the Ninth Circuit opinion reads as an invitation to states to promulgate any type of restriction on the rights of voters and candidates, to target any (non-suspect) class of candidates or voters, and to penalize voters and candidates based upon their past electoral successes. Given the court's opinion, it would appear entirely permissible for a state to bar lawyers or teachers from running for legislative office. The Ninth Circuit would presumably view such "qualifications" as "neutral," since the restriction would apply to lawyers and teachers of all political viewpoints, and as "rationally related to a legitimate state interest," since these occupational groups are disproportionately represented in state legislatures and must, therefore, enjoy some electoral advantages (i.e., the value that voters attribute to the experience one gains from lawyering or teaching).

The decision of the Ninth Circuit would also permit states to impose legislative experience *requirements*, as opposed to limitations. That is, a state could require that all candidates for legislative office must have at least six years' experience in some lower political office. The "rational basis" of such "neutral candidate qualification" would be easily established. The Ninth Circuit's opinion raises the specter of a vast array of attempts by the state to "level the playing field" or minimize the electoral advantages enjoyed by some segments of society, including "neutral candidate qualifications" that limit the income or education levels of candidates.

While the foregoing would all appear permissible under the Ninth Circuit's decision, such restrictions should warrant strict scrutiny under the Court's test set forth in *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983). *See* petition (10-

14). In its arrant deference to the political will of the state, the Ninth Circuit virtually ignored the exacting analyses that *Burdick-Anderson* requires. *See, e.g., Anderson*, 460 U.S. at 789 (constitutional challenges to state election laws "cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation") (citations omitted).

As determined by the trial court in *Bates v. Jones* after a trial (and also by the Oregon District Court in *Markham v. Keisling*), the lifetime term limits impose a severe burden on voting and associational rights and are not narrowly tailored to address any compelling interest advanced by the state. Under strict scrutiny, the trial courts in *Bates* and *Markham* found that all purported state interests can be fully addressed by less onerous means. For example, if the interest of the state is reducing the advantages of incumbency, a consecutive term limit would adequately address this interest. *See* petition (14-15). Other alternatives, could also address the interests advanced by the state.[8]

With its cursory treatment of the momentous constitutional issues presented in this case, the Ninth Circuit has essentially left this case, and the fate of voters in California, Oregon, Nevada and elsewhere, to this Court. The

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[8] For example, all perquisites of office could be curtailed. Legislative staffs could be reduced and other legislative resources could be decreased or eliminated. Legislators could be prohibited from using public funds for purposes leading to self-aggrandizement. All franking or related privileges could be eliminated. All incumbency advantages in fundraising could be addressed by public financing of legislative campaigns. Control over legislative re-districting could be assigned to a nonpartisan body. All seniority advantages (e.g. committee chairs and assignments) could be reduced by simply revising the house and senate rules to require committee chair positions to be elected by the committee members and all committee assignments to be made under a rule of proportionality following votes of the various legislative caucuses.

dissent in *Bates v. Jones*, after noting that the majority did not give the important issues "the careful consideration that they deserve," 131 F.3d at 861, observed that the constitutionality of lifetime term limits is a matter "that, ultimately, the Supreme Court must address, and its decision will be a weighty one." *Id.* at 873.

Amici respectfully urge the Court to accept this case for review instead of waiting for other circuits to pass upon the important issues posed herein. In Oregon (as elsewhere), the continued enforcement of the fundamentally undemocratic lifetime term limits will squander some of the state's most precious political resources: its experienced, "tried and tested" legislative members. Waiting for another day, will do little good for Bill Markham and his supporters. Representative Markham has served Oregon's 46th legislative district almost continually since 1968, but he and his supporters are aware that his legislative career cannot be put on hold for long. In the 46th district, justice delayed will indeed be justice denied.

Amici also fear the impact of the Ninth Circuit's suggestion that the states have virtual *carte blanch* in structuring their governments, federal constitutional protections notwithstanding. *Amici* do not share the Ninth Circuit's view that the states (whether by legislative action or voter initiative) will always give due regard to the constitutional rights of the citizenry when structuring their political institutions. The repeated involvement of this Court in ballot access cases (or, perhaps more notably, the one person-one vote cases[9]) is evidence that states are sometimes overzealous in such endeavors and that—whatever the reasons—states often overstep their constitutional bounds. In this instance, the states of California as well as Oregon and others have done just that and, given the Ninth Circuit's unwillingness to intercede, it is left to this Court to issue a reminder that although states "enjoy

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[9] *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962); *and Reynolds v. Simms*, 377 U.S. 533 (1964).

wide latitude in establishing conditions of candidacy for state office, [] in setting such conditions, they may not disregard basic constitutional protections." *Chandler v. Miller*, —— U.S. ——, 117 S.Ct. 1295 (1997).

CONCLUSION

The issue presented in this case is of immeasurable importance. As state legislatures begin to feel the impact of term limits, the meaningful political participation of a great number of voters in California, Oregon and other states, and indeed the quality of political representation in these states, hangs in the balance. The petition for a writ of certiorari should be granted to allow this Court to establish a rule to guide the treatment of an issue which will soon confront many of the states of the Union.

Respectfully submitted,

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